

**A Arah Cipta Sdn Bhd & Anor v Kian Kee Sawmills (M)
Sdn Bhd & Ors**

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Sdn Bhd**

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COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-407-95 AND W-02-646-95
SHAIK DAUD, MAHADEV SHANKAR AND ABU MANSOR JJCA
2 SEPTEMBER 1996

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Civil Procedure — Summary judgment — Setting aside, application for — Allegation that statement of claim discloses no reasonable cause of action — Whether summary judgment should be set aside — Rules of the High Court 1980 O 18 r 19(1)(a)

Land Law — Restraints on dealings — Caveats — Removal of caveat — Whether caveat should be removed pending disposal of case

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There were two appeals in this case. In Civil Appeal No W-02-407-95 ('the first appeal'), the appellants appealed against the decision of the trial judge in allowing the respondents' application to set aside the appellants' writ and statement of claim under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC') as disclosing no reasonable cause of action. Counsel for the appellants submitted that the learned High Court judge ought not to have struck out the claim and that the learned judge erred in permitting the matter to be determined without the benefit of the evidence before the court and that to be adduced at the trial of the matter.

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In Civil Appeal No W-02-646-95 ('the second appeal'), the appellants appealed against the decision of the learned judge for allowing the application of the first defendant for the removal of the caveat lodged by the appellants.

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Held, dismissing both appeals:

(1) On the facts of the case, as far as the pleadings went, the appellants were entitled to go to trial. The several allegations of facts as stated in the pleadings needed ventilation at a proper trial. The case should not have been summarily dismissed as it was not such a plain and obvious case (see p 15H-I).

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(2) The appellants' claim, as laid out in the statement of claim, was supported by the evidence which needed to be ventilated as they all contained serious questions to be tried. It followed therefore that the caveat should have been retained to maintain the status quo pending the disposal of the whole case (see p 16E-F).

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[Bahasa Malaysia summary]

Terdapat dua rayuan dalam kes ini. Dalam Rayuan Sivil No W-02-407-95 ('rayuan pertama'), perayu-perayu membuat rayuan terhadap

keputusan hakim perbicaraan dalam membenarkan permohonan penentang untuk mengetepikan writ dan pernyataan tuntutan perayu-perayu di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') sebagai tidak mendedahkan kausa tindakan yang munasabah. Peguam perayu-perayu berhujah bahawa hakim Mahkamah Tinggi yang arif tidak sepatutnya membatalkan tuntutan itu dan bahawa hakim yang arif tersilap dalam membenarkan perkara tersebut ditentukan tanpa kemudahan keterangan di hadapan mahkamah dan yang akan dikemukakan di perbicaraan perkara tersebut.

Dalam Rayuan Sivil No W-02-646-95 ('rayuan kedua'), perayu-perayu membuat rayuan terhadap keputusan hakim yang arif kerana membenarkan permohonan defendan pertama untuk pembatalan kaveat yang dikemukakan oleh perayu-perayu.

Diputusan, menolak kedua-dua rayuan:

- (1) Atas fakta-fakta kes, sejauh mana berhubung dengan pliding, perayu-perayu berhak meneruskan tindakan ke takat perbicaraan. Pelbagai pengataan fakta seperti yang dinyatakan dalam pliding perlu diutarakan di perbicaraan yang wajar. Kes tidak sepatutnya ditolak secara terus sebab ia bukanlah kes yang begitu nyata dan jelas (lihat ms 15H-I).
- (2) Tuntutan perayu-perayu, seperti yang dinyatakan dalam pernyataan tuntutan, disokong oleh keterangan yang perlu diutarakan oleh kerana mereka semua mengandungi persoalan serius yang perlu dibicarakan. Oleh itu, ini bermakna bahawa kaveat itu patut dibiarkan bagi mengekalkan status quo sementara menunggu penyelesaian keseluruhan kes (lihat ms 16E-F).]

Notes

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3197-3520.

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241-2419.

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a)

Appeal from: Civil Suit No S1-22-101-1995 and Originating Summons No S1-24-461-95 (High Court, Kuala Lumpur)

In the first appeal:

Logan Sabapathy (S Nainappan with him) (Logan Sabapathy & Co) for the appellants.

Gooi Soon Seng (Selvi Sandrasegaram and YK Boo with him) for the first, third and fourth respondents.

Ting Heng Peng (Amin-Tan & Co) for the second respondent.

- A *Lim Kean Chye (B Siva Subramaniam with him) (Jeyaratnam & Chong)* for the fifth and sixth respondents.

In the second appeal:

- Logan Sabapathy (S Nainappan with him) (Logan Sabapathy & Co)* for the appellants.
B *Gooi Soon Seng (Selvi Sandrasegaram and YK Boo with him)* for the respondent.

Civil Appeal No W-02-407-95 (The first appeal)

C *Cur Adv Vult*

- Abu Mansor JCA** (delivering the judgment of the court): In Civil Appeal No W-02-407-95 ('the first appeal'), the appellants were the plaintiffs in the court below and the respondents were the defendants. The appellants were appealing against the decision of the learned judge on 30 June 1995 allowing the defendants' application to set aside the plaintiffs' writ and statement of claim under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC') as disclosing no reasonable cause of action.
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- In Civil Appeal No W-02-646-95 ('the second appeal'), the appellants were also appealing against the decision of the learned judge for allowing the application of the first defendant for the removal of the caveat lodged by the appellants.
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- The appellants' counsel preferred to deal first with the first appeal. After hearing the arguments of both parties, we were unanimous that it was not such a plain and obvious case that the statement of claim should be set aside. We held that the appellants had managed to make out, as pleaded, reasonable causes that needed ventilation at a proper trial. Therefore, we allowed the appeal and set aside the decision of the learned judge and ordered that the case should go to trial.
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- Learned counsel for the appellants, in his submission at the outset, took us through the facts of the case by going through the several paragraphs of the statement of claim as follows:
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- (a) In para 6 of the statement of claim, it was pleaded that the first respondent owned the lands therein referred to. Paragraph 7 states that the lands had been charged by way of third party charges in favour of the second respondent who, despite the value of the lands, was owed substantial sums of money from these third parties.
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(b) Pursuant to para 10 of the statement of claim, the plaintiffs averred that in June 1994, the first appellant entered into the sale agreement for the purchase of the lands from the first respondent. It was common ground that the third respondent was a substantial shareholder of the first respondent and all parties concerned had consented to the sale of the lands to the first appellant. It was also common ground that the sale agreement was varied and supplemented by a supplementary agreement of even date.
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- (c) Paragraphs 10(a) and 10(b)(ii) of the statement of claim stated that the sale agreement provided in express terms for essentially the second respondent, as chargee, to give a confirmation to release the lands for a sum not exceeding the purchase price in the sale agreement (called 'the CCB redemption confirmation'). Paragraph 8(b) and (d) of the statement of claim, however, provided that there were no express terms in the sale agreement for the purchase price sum to extinguish the liability of the aforesaid third parties although the parties involved in the loans were themselves confident that the first appellant would assist. A B
- (d) Vide paras 8(c) and 11 of the statement of claim, the plaintiffs stated that the sale agreement read in conjunction with the supplemental agreement provided for what is termed as additional purchase price, to meet the release and discharge of the caveat under Presentation No 19961/92. In para 11(a)(i) of the statement of claim, it was averred under this supplemental agreement that the first appellant was to pay a sum of RM100,000 to account of the said additional purchase price and this RM100,000 was to be paid upon the coming into being of the CCB redemption confirmation. C D
- (e) In paras 13 and 14 thereof, the plaintiffs claimed steps were taken to secure the CCB redemption confirmation. The CCB redemption confirmation, as contended by the appellants, had come into being. E
- (f) According to para 18 of the statement of claim, the appellants gave notice to complete the purchase and to tender the RM100,000 to account of a completion date fixed for 13 December 1994. In paras 19 and 20 of the statement of claim, the plaintiffs contended that the first defendant's solicitors however sought to argue and raise the only ground that the sale agreement had lapsed or it was wrongly suggested that there was no CCB redemption confirmation as there was no discharge of the third party borrowers/guarantors. F
- (g) Vide paras 15(b) and 19 of the statement of claim, the plaintiffs alleged that it was clear that the third respondent was interfering with the completion by the appellants of the sale agreement. G
- (h) In paras 21, 22 and 23 of the statement of claim, the plaintiffs disputed the purported termination of its sale agreement and gave notice of non-acceptance of such termination. Then lastly in para 24 thereof, the plaintiffs alleged they then discovered the subsequent arrangements involving the fourth, fifth and sixth respondents to the lands. These subsequent arrangements dated back to October 1994, two months before the alleged termination of the appellants' sale agreement. H

The appellants' counsel further submitted that the sole ground relied on by all respondents to strike out the statement of claim was that the same averments did not disclose a reasonable cause of action solely within the meaning of O 18 r 19(1)(a) of the RHC. The appellants' counsel further submitted that this position of going under r 19(1)(a) of the RHC was I

A elected midstream by the respondents despite having earlier filed various affidavits on the matter.

The sum total of the appellants' counsel's submission was that the learned judge erred in law and fact in making the aforesaid decision and findings. It was the appellants' respectful submission that in all the circumstances of the case, and upon a proper application of the tests attaching to applications to strike out similar claims, the learned High Court judge ought not to have struck out the claim — more so on the basis of holding that the pleading itself was unsustainable. Learned counsel added that the learned judge erred in permitting the matter to be determined without the benefit of the evidence before the court and that to be adduced at the trial of the matter.

C With respect, we could not agree with the finding of the learned judge at pp 26–37 of the appeal record. In his grounds, the learned High Court judge supported the decision to strike out the appellants claim on essentially the following grounds:

- D (a) 'I agree with all defence counsel that until the conditions are fulfilled, there can be no contract, there is no cause of action and the whole case collapses, not only against the first defendant but against all the defendants.'
- E (b) '... that the pleadings of the plaintiffs disclosed that the other two conditions have not been fulfilled ...', proceeded to hold that '..... there is nothing in the pleadings to show that the [RM100,000] sum has been paid assuming that with any necessary amendment to the pleadings if need be, it can be shown there has been "CCB redemption confirmation". There is still nothing to show that the condition that the second defendant must consent to the sale has been met ...'.
- F (c) '... fail to see how the five others could have been dragged in as defendants when they were not even parties to the contract entered into between the first plaintiff and the first defendant. It has to be noted that no relief was prayed for against the second, third and fourth defendants on the sale agreement. A prayer was requested for the removal of caveats lodged against the land by the fifth and sixth defendants but no nexus was shown between these two defendants and the agreement entered into between the first plaintiff and the first defendant.'
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H With respect, we found merit in the argument of the counsel for the appellants and we upheld his submission that as far as the pleadings went, the appellants were entitled to go to trial. We were satisfied that the several allegations of facts as stated above needed ventilation at a proper trial in order to determine these proceedings. By the same token, we also held that this case should not have been summarily dismissed as stated; it is not such a plain and obvious case. We allow the appeal with cost and set aside the order of the learned judge. The deposit was ordered to be refunded.

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Appeal allowed.

Civil Appeal No W-02-646-95 (The second appeal)

Cur Adv Vult

Abu Mansor JCA (delivering the judgment of the court): In this appeal, Civil Appeal No W-02-646-95 — referred to as ‘the second appeal’ in our grounds of judgment in the first appeal — the appellants appealed against the decision of the learned judge allowing the first respondent’s application for the removal of the caveat lodged by the appellants. The learned judge made such order immediately after striking out the writ and statement of claim.

The facts of this case are as stated in the grounds of judgment in the first appeal. The grounds the learned judge gave for removing the caveat were as stated in his grounds of judgment at p 20 of the appeal record:

Assuming without deciding that the FIC consent has been given although to another party, Dualthree (M) Sdn Bhd, what seems clear is that as regards the consent and confirmation by the chargee-bank, there has been none nor has there been the deposit of RM100,000 under the supplemental agreement.

We proceeded to hear the appellants’ counsel’s submission to see whether there was consent and confirmation by the chargee-bank and whether the appellants’ counsel could establish that there has been deposit of RM100,000.

After hearing both counsel’s submissions, and after having the benefit of hearing submissions in the first appeal, we had to conclude we were satisfied that the appellants’ claim, as laid out in the statement of claim, was supported by the evidence which, as we had decided in the first appeal, needed to be ventilated as they all contained serious questions to be tried. Since our decision was such, it followed that the caveat should have been retained to maintain the status quo pending the disposal of the whole case. We allowed the appeal with cost and set aside the order of the learned judge.

Appeal allowed.

Reported by Loo Lai Mee

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